

**LETTER OPINION
2002-L-69**

November 29, 2002

The Honorable George J. Keiser
House of Representatives
422 Toronto Dr
Bismarck, ND 58503-0276

Dear Representative Keiser:

Thank you for your letter asking several questions regarding the ownership of and maintenance responsibilities concerning the state veterans cemetery and monuments contributed to the cemetery.

The North Dakota Veterans Cemetery is under the jurisdiction of the Adjutant General. N.D.C.C. §37-03-14. That section requires the Adjutant General to “establish and operate the North Dakota veterans' cemetery.” Therefore, it is my opinion that the Adjutant General is responsible for management of the North Dakota Veterans Cemetery.¹

You also ask who holds title to the Veterans Cemetery. The land upon which the Veterans Cemetery is located was conveyed to the state by quit claim deed in 1990. Real property owned by the state is held in the name of the State of North Dakota, although it may be used for the benefit of a particular department or agency. See N.D.C.C. § 54-01-05.1. In this instance, the Adjutant General is using the property for the North Dakota Veterans Cemetery.

Your third question regarding the legal status and ownership of the monuments in the Veterans Cemetery is a question of fact based, in part, on whether the monuments are fixtures under law.² A fixture is defined in N.D.C.C. § 47-01-05 to include things that are

¹ The Adjutant General may contract with the Parks and Recreation Department to maintain the cemetery. N.D.C.C. § 37-03-14. Both Parks and Recreation Department Director Doug Prchal and Sergeant First Class Phillip Miller, manager of the Veterans Cemetery, advise there is no agreement that has been entered into by those entities.

² If the monuments are fixtures as defined by N.D.C.C. §47-01-05, they would be owned by the state as part of the title ownership of the real property under N.D.C.C.

attached to land, permanently resting upon land or permanently attached to other things that are permanent on the land. In addition, a relevant consideration in determining whether an item is a fixture under the statute includes the intent of the person making the annexation to the realty. Marsh v. Binstock, 462 N.W.2d 172, 174 (N.D. 1990). Therefore, regardless of the physical characteristics of the item, the parties may agree to give it the legal character of a fixture or personalty. Id.

A representative from the Adjutant General's office stated that the Adjutant General allowed several monuments to be placed by private organizations in the Veterans Cemetery, but there are no written agreements concerning the upkeep or maintenance of those monuments. In the absence of a written agreement, the question of whether there is a mutual understanding or agreement regarding ownership and maintenance of the monuments, which would be a factor in determining whether the monuments are fixtures or personalty, is a question of fact which I cannot resolve in a legal opinion. The Adjutant General may wish to reach agreements with persons or entities who have been allowed to place monuments in the Veterans Cemetery, or may choose to promulgate administrative rules addressing this subject.³

Sincerely,

Wayne Stenehjem
Attorney General

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§ 47-01-03 and would be subject to the Adjutant General's authority over the Veterans Cemetery.

³ The Adjutant General has not promulgated administrative rules in the North Dakota Administrative Code which address the Veteran's Cemetery. The Adjutant General is required to follow the Administrative Agencies Practices Act when promulgating rules except "with respect to the division of emergency management." N.D.C.C. § 28-32-01(2)(b). See also N.D.C.C. § 37-03-14. As an example of rulemaking governing military cemeteries, the Department of the Army conditions approval of private monuments in Arlington National Cemetery on agreement that the private party will provide for future maintenance and repairs, and that the Army is not liable for maintenance or damage to the monument. 32 C.F.R. § 553.21(a).